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No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY, *Petitioner*,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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Question Presented

Does the Federal Water Pollution Control Act authorize a nuisance action alleging pollution of an interstate body of water to be brought against a discharger in any state where an impact of the discharge is claimed, under the laws of such state?

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BRIEF OF PETITIONER

Petitioner International Paper Company ("IPCo"),* the defendant below, respectfully submits this brief in support of its request for relief from the judgment of the United States Court of Appeals for the Second Circuit which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin, U.S.D.J.), denying IPCo.'s motion to

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* The caption of the case in the Court contains the names of all the parties to the proceedings in the court below. (The State of Vermont, as a riparian owner, has been joined as a plaintiff.)

dismiss respondents' first cause of action, which relates to the liquid discharges of IPCo.'s plant into Lake Champlain.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is set forth in the Appendix to the Petition (A1-3).* The opinion of the District Court is reported at 602 F. Supp. 264 (D. Vt. 1985) and is set forth in the Appendix to the Petition (A4-25). The judgment of the Court of Appeals was entered November 4, 1985 (A26-27).

The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

Statute and Rules Involved

Sections 103, 309, 401, 402, 505 and 510 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1253, 1319, 1341, 1342, 1365 and 1370 are set forth verbatim in the Appendix to the Petition (A28-49).

Statement of the Case

Procedural History of the Current Litigation

This is a class action commenced in Vermont's Addison County Superior Court on July 5, 1978 by certain residents of Vermont who own riparian lands on the Vermont side of Lake Champlain, a body of interstate water which forms part of the boundary of Vermont and New York. On July 25, 1978, it was removed to the United States District Court in Vermont. The complaint contains two "causes of action." The first cause of action, which is the subject

* "A" citations are to the Appendix to the Petition for a Writ of Certiorari; "JA" citations are to the Joint Appendix filed on May 2, 1986.

of this petition, claims that discharges of treated effluent from IPCo.'s plant in Ticonderoga, New York, into Lake Champlain "constitute a continuing nuisance to the Plaintiffs." Respondents seek $20,000,000 in compensatory damages, $100,000,000 in punitive damages, and injunctive relief which would require IPCo. to restructure completely its water treatment system (JA 27-34). Respondents' second cause of action claims damages and injunctive relief for air pollution and is not at issue here (JA 34-37).

In April 1980, the District Court certified, for purposes of the water pollution claims, a plaintiff class comprising Vermont owners of lakeshore property in three townships of the South Lake area of Lake Champlain. The District Court later added the State of Vermont as a riparian landowner (JA 181).

On June 22, 1981, petitioner moved to dismiss respondents' first cause of action pursuant to Fed. R. Civ. P. 12(c) and 56(b), in part on the authority of this Court's decision in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (*"Milwaukee II"*). In *Milwaukee II*, this Court held that federal common law, which it had earlier held preempted the application of state common law in disputes over interstate waters, *see Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) (*"Milwaukee I"*), was itself preempted by the FWPCA. As Lake Champlain is an interstate body of water, petitioner urged that both federal and state nuisance claims were barred. Respondents resisted, arguing that their state law claims of nuisance survived.

On March 27, 1984, the Seventh Circuit held, in the latest round of the litigation between Illinois and Milwaukee, *Illinois* v. *Milwaukee*, 731 F.2d 403 (1984), *as amended*, Nos. 77-2246 and 81-2236 (May 29, 1984) (*"Milwaukee III"*), that, in view of *Milwaukee I* and

Milwaukee II, there was no basis in the FWPCA for a state other than the state where the source was located (the "source state") to apply its common law to abate discharges into interstate waters, and further indicated that an action to abate could only be maintained in the federal or state courts in the source state. On January 21, 1985, this Court denied petitions for certiorari. *Scott* v. *City of Hammond*, 105 S. Ct. 979 (1985).

On February 5, 1985, notwithstanding the decision in *Milwaukee III*, the Vermont District Court in this case denied petitioner's motion to dismiss, holding, directly contrary to *Milwaukee III*, that the FWPCA authorized nuisance suits to be brought in any court and under the law of any state where the alleged effects of a discharge occur.* The District Court certified its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and stayed further proceedings pending disposition by the Second Circuit.

The Second Circuit affirmed in a one-page *per curiam* opinion "essentially for the reasons set forth in [the District Court's] . . . thorough opinion which [we] adopt in all respects. . . ." (A3). It is this judgment from which petitioner seeks relief.

Prior Proceedings

The present case is the latest development in a history that goes back to at least 1970. In that year, Vermont invoked the original jurisdiction of this Court to bring an action on behalf of itself and its citizens against the State of New York and IPCo alleging that the discharge of liquid waste into Lake Champlain from IPCo's plant at Ticon-

* The District Court also denied petitioner's motion to dismiss on two separate grounds that are not presented for review here.

deroga, New York, constituted a nuisance. *See Vermont* v. *New York*, 406 U.S. 186 (1972); *see also Vermont* v. *New York*, 417 U.S. 270 (1974). Negotiations ensued among Vermont, IPCo and the State of New York and the Federal Environmental Protection Agency ("EPA") which resulted in a settlement agreement ("the 1974 Settlement Agreement") among the parties which spelled out in considerable detail iimits upon the effluent from the IPCo plant, technological changes to be made in the discharge system from the IPCo plant, and extensive procedures for monitoring IPCo's compliance (JA 122).*

Contemporaneous with the 1974 Settlement Agreement, the EPA issued, pursuant to the FWPCA, a draft National Pollution Discharge Elmination System ("NPDES") permit for IPCo's Ticonderoga Mill. That draft permit incorporated the discharge standards contained in the 1974 Settlement Agreement as well as additional requirements (JA 146). Pursuant to Sections 309 and 402 of the FWPCA, 33 U.S.C. §§ 1319 and 1342 (A29-34, A41-51), the EPA sent notice of the draft permit to the State of Vermont as an "affected state" (JA 65). Officials of

* The parties to the original action arrived at an agreed upon consent decree which the Special Master submitted to this Court to have it adopted as the order and judgment of this Court. Questions, however, were raised as to the appropriateness and feasibility of having this Court undertake to supervise the continuous monitoring of compliance with the terms of the settlement, *Vermont* v. *New York*, 417 U.S. 270 (1974), and this Court suggested that the parties might consider other possible means to resolve their dispute, including resort to procedures under the New England Interstate Water Pollution Control Compact, Pub. L. No. 292, 61 Stat. 682 (1947), *codified at* New York Environmental Conservation Law, §§ 21-0101 *et seq.* (McKinney's 1984); 10 Vermont Statutes Annotated §§ 1331 *et seq.* (Equity 1984); or to an interparty settlement. *Id.* at 277-78. The parties further negotiated among themselves, with the result that a settlement agreement was finally arrived at, and filed with this Court, which obviated the need for Court supervision of the settlement (JA 63).

Vermont as well as representatives of The Lake Champlain Committee (the principal private environmental organization in the Champlain Valley) participated in all subsequent negotiations among the EPA, New York and petitioner (JA 65). The parties eventually reached complete agreement and the EPA issued a final NPDES permit for petitioner's mill on March 17, 1977 (JA 69).* Petitioner installed a $3,000,000 addition to its waste water treatment system to achieve compliance with certain of the permit requirements (JA 67).

Petitioner's permit is one of the most stringent in the country and contains detailed limits on nearly every component of the mill's discharge (JA 70). Petitioner makes detailed monthly reports on the performance of the waste water treatment system, including precise daily readings for numerous parameters, to New York, EPA, and Vermont (JA 70).**

Although the complaint contains a separate "count" alleging that the mill's discharges into Lake Champlain "consistently . . . violated the terms" of the NPDES permit (JA 30), the focus of the plaintiff's nuisance claim here is that the continued discharge of liquid material into Lake Champlain from IPCo's plant constitutes a common law nuisance and gives rise to a claim for both punitive and

* Upon approval by the EPA of New York's permitting program the NPDES permit was adopted by New York as a New York State Pollution Discharge Elimination System ("SPDES") permit (JA 70).

** On the basis of those reports and its own observations, the Environmental Conservation Agency of the State of Vermont stated in writing to the District Court on September 23, 1981 that the "IPCo. discharge is currently well within the stringent permit limits . . . [and] . . . the effects of the present discharge on the Lake are minimal" (JA 180).

compensatory damages and for injunctive relief, whether or not the mill complies with the settlement and the EPA permit.

Summary of Argument

The decisions below represent a fundamental misunderstanding of the legislative goals underlying the FWPCA. Through a misapplication of statutory interpretation, the courts below adopted a construction of the FWPCA and of this Court's precedents which would produce a parochial patchwork of conflicting multistate regulation of interstate waters and of "point sources" which discharge into such waters. Such a reading defeats the purpose of the comprehensive system of federal and source state regulation of dischargers delineated by the FWPCA, and effectively disrupts the overall scheme of regulation embodied in that statute.

Exposing sources which must discharge effluents into interstate waters to the varying statutory and common laws of all states whose boundaries touch on waters into which those discharges are made will make it difficult, if not impossible, for these dischargers to determine what constitutes an acceptable effluent discharge level. They will face a post facto threat of punitive and compensatory damages, premised upon "vague and indeterminate nuisance concepts", *Milwaukee II*, 451 U.S. at 317, from the respective states' laws, as well as mandatory and prohibitory injunctions imposing potentially conflicting and irreconcilable discharge standards. These tendencies are exacerbated by the decision to allow common law principles of liability and remedy to be applied by courts sitting in any state whose citizens are alleged to have been injured by such discharges. Such a process threatens to render meaningless the permit scheme of the FWPCA, since dischargers into interstate waters will remain subject to the various nuisance laws of the various riparian and downstream states and the various interpreta-

tions of such laws by a multiplicity of court systems despite full compliance with permits issued by the EPA and by the state agency where they are located.

The decisions below, which directly conflict with the decision of the Seventh Circuit in *Milwaukee III*, would also embroil states in harmful and disruptive disputes over basic interests of state sovereignty engendered by extraterritorial regulation of dischargers, which was one of the very concerns that led this Court in *Milwaukee I* to affirm the paramountcy of federal law in interstate water disputes. Their practical effect is to create chaos and uncertainty, replacing a comprehensive system of regulation of interstate waters with a disjointed and disruptive melange of multistate regulation.

ARGUMENT

The Regulatory Scheme Embodied in the FWPCA and the Decisions of This Court Do Not Permit or Contemplate Regulation of Discharges Into Interstate Waters by the Courts or Under the Law of a State Other Than That Which Is the Source of the Discharge.

The decision of the Vermont District Court reflects a misapprehension of the effect of this Court's decisions in *Milwaukee I* and *Milwaukee II* which leads to a misinterpretation of the scheme of federal regulation of discharges into interstate waters established by the FWPCA and of the language of the FWPCA. This Court's precedents make clear that the uniquely federal nature of interstate water disputes requires the displacement of varying state statutory and common law with a comprehensive body of federal law governing interstate pollution. The FWPCA reflects an all-encompassing federal scheme to regulate the use of navigable and interstate waters, a scheme which assigns a specific but limited role to source state regulation. By allowing

multistate regulation of interstate waters, applied through state common law as well as statutory law, the decisions below not only misapply the FWPCA but also misread Congress' intent in enacting the statute.

A. The 1972 Amendments to the FWPCA Establish a Federal/State Partnership Which Recognizes the Paramountcy of Federal and Source State Interest.

Prior to the passage of the 1972 amendments to the FWPCA, this Court had recognized the need to preempt state common law regulation of interstate water disputes in favor of the development of a uniform and comprehensive body of federal regulation. In *Milwaukee I*, this Court held that "Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." 406 U.S. at 107 n.9 (quoting *Texas* v. *Pankey*, 441 F.2d 236, 241 (10th Cir. 1971)).* Recognizing that the then-existing FWPCA failed to provide a comprehensive federal scheme governing interstate water disputes, this Court concluded that the creation of federal common law was both appropriate and necessary.

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* It seems, at least in retrospect, that *Milwaukee I* (and perhaps *Ohio* v. *Wyandotte*, 401 U.S. 493, 498-99 n.3 (1971), which we discuss *infra* at p. 15 n.*), may have reflected dissatisfaction with the regulatory scheme that existed before the FWPCA amendments. *See Environmental Protection Agency* v. *State Water Resources Control Board*, 426 U.S. 200, 202-03 (1976). That scheme, articulated in the original 1948 Federal Water Pollution Control Act, 62 Stat 1155, 33 USC §§ 1151 et seq., and deemed "inadequate in every vital aspect" by the Senate Committee on Public Works, S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Legislative History of the Clean Water Act Amendments of 1972, p. 1425, relied on state regulation of water pollution, supplemented by federal regulatory statutes and proceedings before this Court in the exercise of its original jurisdiction.

That interstate water disputes are resolved by recourse to paramount federal law was implicitly reaffirmed in *Milwaukee II* when this Court held that, by the 1972 amendments to the FWPCA, Congress had "occupied the field" of the regulation of discharges into interstate waters and thereby in turn displaced federal common law. The 1972 amendments, which represented a "complete rewriting" of the existing statute, House Debate on H.R. 11896 (March 27, 1982) (remarks of Representative Jones), *reprinted in* 1 Legislative History of the Clean Water Act Amendments of 1972 (hereafter "Leg. Hist."), pp. 359-360, effectively created a new body of federal law governing all aspects of interstate pollution, "an all encompassing program of water pollution regulation." *Milwaukee II*, 451 U.S. at 318. The administrative scheme established by Congress, which focuses upon a permitting procedure directed at individual dischargers, so-called "point sources",* imposes minimum pollution control standards on each such point source and insures uniformity in the administration and enforcement of those minimum standards.** The Act provides for civil penalties for violations of its requirements or of the standards imposed by permits issued under its authority, § 309(a) of the Act, 33 U.S.C. § 1391(a) (A29-32), as well as suits by affected persons and by the governors of affected states to compel compliance, § 505(a) and (h) of the Act, 33 U.S.C. § 1365(a) and (h) (A51, A54), but does not provide a private right of action for damages. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1980).

* "Point source" is defined in § 502(14) of the Act, 33 U.S.C. § 1362(14), as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

** The statutory scheme that is embodied in the 1972 amendments, and the profound change in the approach to water discharge regulation these amendments embodied, is carefully set forth in *EPA* v. *State Water Resources Control Board, supra,* 426 U.S. at 202-209.

Although the statute was intended to reflect a national policy of pollution control, it does not ignore the interests of riparian states in the control of the use of navigable waters. The Act, however, makes a fundamental distinction between the authority of the state in which a source is located and a non-source state which may be affected by the discharge. The Act recognizes that a source state has a direct interest in the regulation of a point source within its jurisdiction and provides that where the law of the source state imposes more stringent requirements than are imposed by the federal EPA, those more stringent state requirements shall constitute the standard to be met by the discharger. FWPCA § 510(1), 33 U.S.C. § 1370(1) (A55). Thus, although the Act contemplates that federal regulations will impose a uniform minimum standard on water discharges, it recognizes and fosters the application of more stringent standards imposed by the source state.*

* In dealing with this obvious source of potential tension, the Act plainly supports federal paramountcy by making the EPA Administrator the primary arbiter, subject to federal court review, of whether a source state's permitting program in fact embodies requirements "more stringent" than the EPA's and in fact meets the standards of the Act, including an appropriate response to the concerns of affected non-source states; it also requires that a state desiring to create a permitting program of its own satisfy the EPA Administrator that it is qualified to carry out such a program effectively. § 402(b), 33 U.S.C. § 1342(b) (A42-45). At the same time, the Act makes clear that, although a point source must comply with both the requirements of federal regulation and more stringent requirements imposed by a source state, it will be subject to a *single* permit and a *single* permitting authority. As this Court recognized in *EPA* v. *State Water Resources Control Board, supra,* 426 U.S. at 206, where the EPA has approved the issuance by a state of a permit embodying more stringent standards than EPA requirements, the state permit shall effectively "supersede" the federal permitting authority. § 402(c), 33 U.S.C. § 1342(c) (A45-46). Furthermore, numerous courts have recognized that the federal statute requires a discharger to seek a permit only in the source state and not in any

(footnote continued on following page)

The Act deals differently with the interests of non-source riparian states. It requires the Administrator of the EPA to notify, *inter alia*, every state that might be affected by a discharge of his intent to adopt a permit, and to allow any state to be heard in opposition to issuance of the permit. § 401(a)(2), 33 U.S.C. § 1341(a)(2) (A36-37). Section 402(b), 33 U.S.C. § 1342(b) (A42-45), imposes a similar requirement upon the source state, directing that if a state desires to administer its own permit program for discharge into navigable waters within its jurisdiction, it shall give notice, an opportunity for hearing and the right to submit recommendations to any state whose waters might be affected by a discharge from within its borders and mandating further that should a state in its permitting process reject the recommendation of any other state, it shall notify the EPA Administrator, who is empowered to prevent issuance of the state permit. In addition, both the governor and citizens of a state injured by a discharge occurring in another state may sue in the federal judicial district where the source is located to enforce effluent limitations established under the Act. *See* § 505(a), (c) and (h), 33 U.S.C. § 1365 (a), (c) and (h) (A51-54).*

(footnote continued from preceding page)

other state which might be affected by a discharge. *See, e.g., Tennessee* v. *Champion International Corporation*, No. 85-36-I, slip. op. at 7-8 (S. Ct. Tenn. 1986); *Lake Erie Alliance For Protection of Coastal Corridor* v. *U.S. Army Corp. of Engineers*, 526 F. Supp. 1063 (W.D. Pa.), *aff'd*, 707 F.2d 1392 (3d Cir. 1983), *cert. denied* 464 U.S. 915 (1983).

* To the extent that the instant action is an action to enforce the terms of the permit granted to petitioner (or of the regulations adopted by the EPA or by some state), it would seem to be subject to this forum requirement. Such an action would not—and could not—seek damages or "abatement" beyond compliance with the permit or the regulations. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1980).

The FWPCA thus recognizes—and deals with—a potential conflict among riparian states or between such states and the federal regulations, as to the appropriate use of interstate waters. In adopting this model, the Congress rejected polar positions—on the one hand, that no discharge into interstate waters is permissible if any riparian state regards it as impermissible, and, on the other, that the source state has untrammeled authority unilaterally to establish permissible limits on the use of its boundary waters. The FWPCA effectively recognizes the paramount federal interest by providing both a means to deal finally with conflicting state interests and a minimum uniform federal standard applicable to all interstate waters, without ignoring the interests of both the source state and other riparian states.*

B. The Decision Below Misconstrues the Savings Clauses of the FWPCA.

The Vermont District Court correctly concluded that, after *Milwaukee I* and *Milwaukee II*, "state law . . . cannot

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* In the Brief for the United States as Amicus Curiae submitted in opposition to the Petition for Certiorari in *Milwaukee III*, the Solicitor General concluded that the Act:

> "creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. The federal government establishes threshold pollution control requirements (*see, e.g.*, 33 U.S.C. 1311, 1312, 1316, 1317), subject to state decisions to 'adopt more stringent limitations through state administrative processes, [or] establish such limitations through state nuisance law, and apply them to in-state discharges.' Milwaukee II, 451 U.S. at 328. . . . Under this partnership, the states must defer to the federal government's choice of minimum national requirements, but they reserve the unqualified power to determine to what degree they wish to impose more stringent limitations within their borders. *If, as Illinois argues, one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed.*" *Id.* at 10 (emphasis added).

control interstate water pollution controversies" absent congressional authorization. 602 F. Supp. at 270 (A17). Despite this recognition of the paramount federal interest in interstate water regulation, however, the Vermont District Court went on to hold, on the basis of a strained interpretation of the legislative history of the FWPCA, that the savings and state authority provisions of the FWPCA—§ 505(e), 33 U.S.C. § 1365(e) (A53) and § 510, 33 U.S.C. § 1370 (A55), respectively—"authorize actions to redress injury caused by water pollution of interstate waters under the common law of the state in which the injury occurred" and in the courts of that state. *Id.* at 274 (A2). Such a construction, we submit, has no support in the statute's language or legislative history or in the regulatory scheme.

Section 510(2), 33 U.S.C. § 1370(2) (A55) provides in pertinent part that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." Section 505(e) (A53), provides that

> "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ."

The Vermont District Court's conclusion that §§ 505 and 510 authorize a state or its residents to bring an action in their own courts under their state's laws against an out-of-state discharger was based on its view that Congress must have believed such an action was available at the time the FWPCA was under consideration in the Congress. According to the Vermont court, the fact that *Milwaukee I* was not decided by this Court until after the FWPCA was

drafted implies that, in enacting the FWPCA, Congress viewed as the current state of the law the suggestion in *dicta* in this Court's decision, in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498-99 n.3 (1971), that state law would govern an interstate water dispute and therefore intended to preserve such state jurisdiction over discharges into interstate waters.

This conclusion represents a misapplication of statutory interpretation. There is nothing in the legislative history of the FWPCA to suggest that Congress viewed *Wyandotte* as representing the "state of the law" at either the time the FWPCA was drafted and debated or at the time it was passed.* In *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), this Court had made it clear that interstate water disputes were governed by federal common law. Six months *before* final passage of the FWPCA, *Milwaukee I* expressly rejected any suggestion in the *Wyandotte* footnote to the contrary and held explicitly that federal law, not state law, controlled interstate water disputes. *See* 406 U.S. at 102 and n.3. *Milwaukee I* was decided on April 24, 1972; the FWPCA was

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* The precise meaning of footnote 3 to the *Wyandotte* opinion is unclear. *See Milwaukee I*, 406 U.S. at 102 n.2 (the conclusion in *Wyandotte* "was based on the preoccupation of that litigation with public nuisance under Ohio law"). *Wyandotte* clearly bespoke a rejection of routine reliance upon this Court's original jurisdiction to referee controversies over discharges into interstate waters. It also recognized that, although the principles of decision applicable where a state invoked this Court's original jurisdiction to seek redress against pollution emanating from another state are federal law principles, they drew upon the common law of nuisance developed by the states. In view of *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) which was decided on the same day as *Erie* v. *Tompkins*, 304 U.S. 64 (1938), it seems at least unlikely that this Court intended to overrule *sub silentio* its established principle that regulation of interstate waters was a matter of "federal common law".

enacted by Congress on October 18, 1972. During that six month period, the Senate and House Conference Committee thoroughly debated the Senate and House versions of the bill, ultimately issuing a conference report; the House and Senate then debated and enacted the conference bill. The suggestion that Congress "relied on" the *Wyandotte* footnote and was unaware of the *Milwaukee I* holding is so speculative that it cannot be a guide to Congressional intent. Looking at the state of facts (and law) that existed on the date the FWPCA was passed, the § 505(e) savings clause plainly could not "save" any state law remedy with respect to discharges into interstate waters, since no such state jurisdiction existed. And § 510, according to *Milwaukee II*, applies only to state regulation of *in-state discharges*. 451 U.S. at 327-28.*

Moreover, to construe § 505(e) as reflecting an intent of Congress to give renewed vitality to the *Wyandotte*

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* The Vermont District Court relied heavily on this Court's observation in *Milwaukee II*, 451 U.S. at 327 n.19, that, since the suggestion in the *Wyandotte* footnote had not yet been rejected during much of the "legislative activity" leading up to the Act, Congress could not have intended to preserve a federal common law remedy. 602 F. Supp. at 269 (A14). However, this fails to justify the conclusion that Congress *did* intend to revive a particular state law remedy by § 505(e), 33 U.S.C. § 1365(e); in fact, this Court has made plain in *Milwaukee II* its view that any such intention was unlikely:

> "The fact that the language of § 505(e) is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation, see n.21 *supra*, indicates that *it does not reflect any considered judgment about what other remedies were previously available* or continue to be available under any particular statute." 451 U.S. at 329 n.22 (emphasis supplied).

Cf. Middlesex County Sewerage Authority v. *National Sea Clammers Association, supra*, 453 U.S. at 15-16 (noting in another context that the savings clause language is "quite ambiguous").

footnote by recognizing the legislative jurisdiction, whether by common law or statute, of a non-source riparian state to regulate discharges from a source in another state, requires the conclusion that Congress intended to recognize (and affirm) such jurisdiction without in any way dealing with the effects of such purported power on the already complicated interplay of federal and source state jurisdiction embodied in the FWPCA's permitting scheme.* It is inconceivable that Congress would have failed to provide any procedure to deal with conflicts between the requirements developed by the source state and those developed by judges and juries in other riparian states at the same time that it provided a very specific procedure to reconcile differences between the federal and the source state permitting authorities and an equally specific procedure to ensure that the interests of non-source riparian states are represented in the permitting process.** In short, if one assumes that the FWPCA is intended to affirm the legislative competence of non-source riparian states to impose their own judgments (and those of their courts and juries) on out-of-state dischargers, one is forced to con-

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* If the FWPCA is construed as expressing a Congressional intent not to preempt a downstream state's legislative jurisdiction over the discharges into interstate waters of a point source located in another state, the decisions of its courts would be made in the exercise of competent state law and arguably would not be subject to review even by this Court, except perhaps on theories of discriminatory burden. *See, e.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1969); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 262 (1984).

** The ironic consequence of the Vermont District Court's view of § 505(e) is that although the source state, in framing its permit for a domestic source, is required to take account of the interests of other affected riparian states, non-source riparian states have no statutory obligation to consider the source state's interests in exercising control by statute or common law over dischargers located in the source state. Under this view of the FWPCA, a downstream state's authority to regulate out-of-state dischargers is significantly less constrained than that of the source state.

clude that Congress affirmed a power which threatens to overwhelm the regulatory scheme it carefuily prescribed.

There is nothing in the language of the FWPCA or in its legislative history which supports, much less compels, this construction of the Act. Certainly, nothing in the legislative history of the FWPCA supports the view that Congress believed that a state or its residents could bring an action in their courts under their state's laws against an out-of-state discharger. *Milwaukee I* represented the "state of the law" for almost six months before the 1972 amendments to the FWPCA were adopted; even prior to *Milwaukee I, Hinderlider* had established that federal, not state, common law governs interstate water disputes. Any logical reading of § 505(e) (A53), in the context of this Court's precedents and in light of the lack of legislative history supporting a different construction, compels the conclusion that Congress intended no more than generally to prevent Section 505 from being read to extinguish any existing rights the states had, such as the traditional right of a state to regulate discharges within its borders, that might otherwise have been viewed as preempted if Section 505 were given an overly expansive reading.*

In contrast to the Vermont Court, the Seventh Circuit in *Milwaukee III* approached its analysis of the FWPCA and of Sections 505 and 510 (A53, A55) with the recognition that interstate water pollution "is a controversy of federal dimensions, implicating the conflicting rights of states and

* As this Court observed in *Milwaukee II*, 451 U.S. at 328-29, and *Middiesex County Sewerage Authority* v. *National Sea Clammers Association, supra,* 453 U.S. at 15-16 (1980), Section 505(e) deals in terms only with possible preemptive implications of the language of Section 505, not the preemptive effects of the FWPCA taken as a whole.

inappropriate for state law resolution," 731 F.2d at 410,* and concluded, based on the legislative history, that the FWPCA did not provide any basis for any state other than the source state to exercise jurisdiction over interstate waters, although it might support the power of the courts of the source state to supplement the FWPCA by applying the common (or statutory) law of that state to provide a remedy for actual damages to riparian interests injured by discharges into a source state's waters. 731 F.2d at 414.

Analyzing the "saving clauses" of the FWPCA in light of the statute's purpose, the Seventh Circuit first concluded that, given the emphasis of the FWPCA on the "role of the state where the discharge in question occurs" and "the conflict and confusion which could result from any different construction", 731 F.2d at 413, Section 510(1), 33 U.S.C. § 1370(1) (A55), which provides that a state may adopt discharge limitations more stringent than the federal limitations, must be limited to state-imposed limitations "with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state." *Id.* The court reasoned

* In the Brief for the United States as Amicus Curiae submitted in opposition to the Petition for Certiorari in *Milwaukee III,* the Solicitor General observed that *Milwaukee I* "left no doubt that the law of one state could not be relied upon to abate a discharge in another state." Brief for the United States at 7. In the Solicitor General's view, *Milwaukee II* did not specifically address the question whether state law could be invoked to limit discharges in a second state. He urged, however, that the "opinion [in *Milwaukee II*] lends no support . . . to the contention that such state law remedies were revived by the decision in *Milwaukee II,* and, indeed, the discussion there strongly suggests that such remedies are not available." Brief for the United States at 8. After passage of the 1972 amendments, which created a more comprehensive federal scheme of regulation, the Solicitor General concluded, the reasons underlying the Court's decision in *Milwaukee I* that federal law, not state law, applies in interstate water disputes "appear considerably stronger." *Id.* at 11.

that in § 510(2), 33 U.S.C. § 1370(2) (A55), which provides that the jurisdiction of the states was not impaired, "Congress intended no more than to save the right and jurisdiction of a state to regulate activity *occurring within* the confines of its boundary waters." *Id.* (footnote omitted; emphasis added).

As we have noted, the Seventh Circuit nevertheless construed the FWPCA as preserving a state's (or an individual's) right to bring a state-based common law action against a discharger in the courts of the source state under the laws of that state. *See, e.g., Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973). It concluded that "the reference in § 1365(e) [§ 505(e)] to statute or common law, like the reference to right or jurisdiction of a state in § 1370 [§ 510], is to a statute or the common law of the state in which the discharge occurs." 731 F.2d at 414 (footnote omitted). But the court found it "implausible that Congress meant to confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on dischargers in [or from] State I by applying the statutes or common law of State II." 731 F.2d at 414. If the "savings clause" were so read, the court observed, the "uniformity and state cooperation envisioned by the Act" would be undermined. 731 F.2d at 414. Additionally, it said,

> "[f]or a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful

> discharge into an interstate body of water. Any permit issued under the [FWPCA] would be rendered meaningless." *Id.**

On Illinois' petition for rehearing, the court rejected that state's request that it be permitted to proceed in federal district court in Illinois. The court amended its earlier opinion to clarify that only the federal and state courts in the source state have jurisdiction to apply the law of the source state to disputes over discharges that produce effects in interstate waters.** In so doing, the Seventh Circuit responded to suggestions in the legislative history of the FWPCA that Congress intended, in enacting the FWPCA, not to foreclose existing private rights of action for damages. *See, e.g.*, S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971), *reprinted in* 2 Leg. Hist at 1499:

> "It should be noted, however, that [§ 505] would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a

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* In its recent decision in *Tennessee* v. *Champion International Corp.*, No. 85-36-I, slip op. at 13-14 (S. Ct. Tenn. 1986), the Tennessee Supreme Court adopted the reasoning of the Seventh Circuit in *Milwaukee III* and determined that Tennessee could not exercise jurisdiction over a paper mill located in South Carolina and operating under an EPA approved permit, despite the effects of the mill's discharges on Tennessee. The court concluded that the FWPCA's permitting process provides ample opportunity to respond to non-source states' interests and that therefore a discharger should be entitled to rely on the standards established in the source state's permit.

** "Nothing in our decision precludes the application of Wisconsin or Indiana law by state or federal courts *in one of those states* at the suit of out-of-state parties affected by discharges in that state." *Illinois* v. *Milwaukee*, Nos. 77-2246 & 81-2236, slip op. at 4 (7th Cir. May 29, 1984) (emphasis added).

> defense to a common law action for pollution damages."

The construction of the Act arrived at by the Seventh Circuit gives heed to that desire without doing violence to the regulatory scheme of the FWPCA or inviting the multistate conflict of regulation that gave it concern.

It might, of course, be argued that the comment in the Senate Report is no more than a paraphrase of the language of the "savings clause", § 505(e), 33 U.S.C. § 1365(e), and that, in view of *Milwaukee I*, it does not "save" state-based rights of action which were held by that decision to have been preempted.* Alternately, it could be argued that respect for the Report's statement merely counsels preservation of such private rights for damages caused by interstate water pollution as might be implied, as a matter of "interstitial" federal common law, to supplement the scheme of the FWPCA. This Court has made clear, however, that it does not find in the FWPCA or in its legislative history any basis to imply a private federal common law action to recover damages or enforce any other common law remedies. *Milwaukee II; Middlesex County Sewerage Authority* v. *National Sea Clammers, supra*, 453 U.S. 1 (1981); *see also Conner* v. *Aerovox, Inc.*, 730 F.2d 835 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1747 (1985) (actions for "maritime torts" preempted by FWPCA); *United States* v. *Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981) (same). In these circumstances, the Seventh Circuit's suggestion that federal and state courts in the source states may apply source state law to provide a damage remedy in the case of a discharge into interstate

* Given that the FWPCA regulates waters other than the interstate waters referred to in *Milwaukee I*, but which might nevertheless be subject to preemption if Congress chose to exercise its full power, this interpretation would not render meaningless § 505(e), 33 U.S.C. 1365(e) (A53), or ignore the statement in the Senate Report.

waters that causes injury, is to be seen, not as a grudging obeisance to a considered decision of the Congress, but as a carefully crafted effort to afford a private damage remedy in addition to the civil enforcement and penalty provisions set forth in the Act in the manner which best comports with the overall statutory scheme.

Assuming as we do that the FWPCA, in combination with *Milwaukee I* and *Milwaukee II*, did not altogether preempt damage actions based on a source state's common law with respect to a source discharging into interstate waters, it is clearly necessary to confine such actions to federal or state courts sitting in the source state if the federal interest expressed in *Milwaukee I* and *Milwaukee II* to avoid interstate conflict and the allocatory judgment of Congress in defining the roles of source states and non-source states in the regulation of interstate waters are not to be frustrated.* As this Court observed in *Milwaukee II*, the common law of nuisance is "vague" and "indeterminate". 451 U.S. at

* The Vermont District Court noted that under familar choice of law and diversity jurisdiction principles, courts in one state routinely apply another state's substantive law and federal courts routinely apply state law. 602 F. Supp. at 270 (A10). What the Seventh Circuit saw in the totality of the scheme of the FWPCA, however, was not a choice of law principle, but a forum choice which was necessary to avoid an unacceptable multiplication of regulation. As the United States stated in its amicus brief in *Milwaukee III:*

> "This case is not an ordinary tort suit; it involves the question of pollution of interstate waters which this court repeatedly has held to require special treatment. There is not presented a choice-of-law question in the sense considered in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Rather, it is clear that federal law governs (see *Milwaukee I*, 406 U.S. at 105 and n.7; *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), and state law is preempted to the extent required by federal law. For the reasons discussed above, the federal

(footnote continued on following page)

317. The potential for conflict that is unavoidably associated with the application of such a body of regulation is, therefore, as much involved in allowing it to be applied by decisions in a variety of states as in subjecting a single discharge source to the substantive law of a multitude of states.

Congress recognized the need to ensure that local courts exercise jurisdiction over regulatory actions relating to local pollution sources when, in § 505(c), it required that suits under *federal* law to enforce permit limits and suits by governors of affected states to enforce permit limits be brought only in the judicial district in which the source is located.* The general emphasis in the FWPCA on the partnership between federal regulation and more stringent regulation by the source state in the control of local pollution sources, as well as the federal concern to prevent conflicting multistate control of the use of interstate waters, supports the Seventh Circuit's conclusion that state-law based actions aimed at discharges into interstate waters must be based solely on the law of the source state and confined to the federal and state courts of the

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(footnote continued from preceding page)

statutory scheme here has left room for a suit under state law against a discharger in that state, but not in another state." Brief for the United States at 13 n.12.

* Even in these narrow circumstances, Congress was concerned about the potential for the development by the courts of inconsistent policy implicit in its decision to allow citizen suits to compel compliance with the Act, although it concluded that this danger was minimized in such cases because the issues would be simple and there would be a complete factual record. S. Rep. 92-414, 92d Cong., 1st Sess. 80 (1971), *reprinted* in 2 Leg. Hist. at 1498. Obviously, there would be a far greater potential for the creation of inconsistent policies if courts of several states were applying common law standards to regulate a single discharge source.

source state.* Indeed, given Congress' express direction in § 505(c) of the Act that actions based on federal law be brought in the source state's courts, the implicit direction of sutis based on source state law to the same forum is an *a fortiori* case.

C. Federal Preemption of Non-Source State Regulation of Discharges Into Interstate Waters Must Extend to State Law-Based Common Law Claims by Private Parties as Well as the State Itself.

In an attempt to distinguish *Milwaukee III* from the present case, the Vermont District Court assigned weight to the fact that this case involved only private parties seeking application of nuisance law that was "not [intended] to regulate the activity of neighboring states. . . ." 602 F. Supp. at 271 (A19). As such, the court considered the respondents' nuisance claim for substantial actual and punitive damages and injunctive relief to pose at most only a "purely incidental" intrusion upon the sovereignty of the discharger's state, *id.* at 271 (A19), which "merely supplement[s] the standards and limitations imposed by the Act." *Id.* (A17).

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* In this case, there is an independent ground for requiring that plaintiffs' actions be tried in the New York federal court. As we have noted, "Count Two" of plaintiffs' "First Cause of Action" alleges that IPCo's dscharges violate the NPDES permit applicable to the plant (JA 30). It seems clear that such a claim is one which "arises under" the FWPCA and therefore must be brought in the judicial district where the source is located. Under established principles of federal pleading, a plaintiff is required to incorporate in his action all claims for relief which are based upon the same transaction or nexus of facts to avoid subsequent preclusion of any claim based on that transaction. *See, e.g., U.S. Industries, Inc.* v. *Blake Const. Co. Inc.*, 765 F.2d 195, 204 (D.C. Cir. 1985); *Kozman* v. *Trans World Airlines*, 236 F.2d 527, 536 (2d Cir. 1956); *Restatement (Second) of Judgments* § 19 (1982). Since plaintiffs' claim that IPCo's discharges violate the NPDES permit must be brought in the Northern District of New York, it would seem that they must also bring any damage claims in the same action.

Contrary to the suggestion of the Vermont District Court, the relief sought here—more than a hundred million dollars in punitive and compensatory damages and injunctive relief which may require reconstruction of the mill—cannot fairly be described as an "incidental intrusion" upon the sovereignty of New York or of the United States. Nor can it be justified as a "mere supplement" to the FWPCA. If Vermont could "supplement" the control of the EPA and New York over a New York discharger by imposing, through its nuisance law, new and possibly infeasible treatment requirements, either in the form of equitable relief or damage awards which require process changes to avert future awards, the discharger would be subjected endlessly to increased expenses, operational disruption, perhaps even termination, and the FWPCA permitting process would at very least be seriously undermined.

This Court has long recognized that where Congress has comprehensively regulated a field of activity, its action preempts all state regulation of that field, absent a clear indication that Congress intends to preserve some state regulatory role at the cost of tension between federal and state powers. *See Pacific Gas & Elec.* v. *Energy Resources Comm'n,* 461 U.S. 190 (1983); *Silkwood* v. *Kerr-McGee,* 464 U.S. 239 (1983).* And this Court held, as early as *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 246-47 (1958), that such comprehensive regulation

* In *Silkwood* v. *Kerr-McGee,* a majority of this Court sustained state common law competence to impose traditional tort remedies, including compensatory and punitive damages, against an operator of a nuclear plant in spite of the comprehensive federal regulation of nuclear plant safety embodied in the Atomic Energy Act and its successors, because they found in the Price Anderson Act and its legislative history a clear congressional purpose to preserve such remedies in addition to the federal regulatory scheme. 464 U.S. at 248-58. The legislative history of the FWPCA provides no such evidence of Congressional intent.

preempts state remedies as well as state regulations. *See also Chicago & North Western Transportation* v. *Kalo Brick & Tile Co.,* 450 U.S. 311, 324-27 (1981).

As we have argued above, there is no indication that in enacting the FWPCA and its comprehensive scheme to regulate discharges into navigable waters, Congress intended to preserve, much less to create, common law jurisdiction in non-source states over discharges into interstate waters. Absent such an expression of congressional intent, the Vermont common law nuisance remedies, which respondents seek to invoke against a New York discharger, by way of injunction and punitive and compensatory damages, are preempted as fully as any other putative Vermont regulation of discharges into interstate waters from an out-of-state source.

CONCLUSION

The decision below places petitioner, and others similarly situated, in the untenable position of being subject to regulation by the EPA, the state in which they are located, and the potentially conflicting statutes, regulations and case law of all the states with borders contiguous with the interstate bodies of water into which their discharges are made. It replaces a uniform and comprehensive scheme of regulation that establishes a workable partnership between the federal government and the source state with a disruptive and fragmentary system of multistate regulation, which is fraught with the potential for unresolvable interstate conflict. It should be reversed.

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